UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

ENVIRO-TECH Employer and LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL 332 Petitioner	Case 4–RC-20849

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Enviro-Tech, is a Philadelphia, Pennsylvania contractor that provides janitorial and other cleaning services to customers. The Petitioner, Laborers' Local 332, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of the Employer's laborers. The Petitioner has taken the position that the unit should include employees working at both of its jobsites.[1] The Employer contends that the petition should be dismissed because the Employer is not in commerce and because its laborers are temporary employees with no reasonable expectation of continuing employment with the Employer.[2] Finally, there is an issue as to the Petitioner's labor organization status.

A hearing officer of the Board held a hearing, but neither party filed a brief.[3] I have considered the evidence and the arguments presented by the parties. As discussed below, I have concluded that: (1) the Employer is engaged in interstate commerce; (2) the Petitioner is a labor organization within the meaning of Section 2(5) of the Act; (3) the Employer's employees

[1] The Employer did not take a position on this issue.
[2] The Petitioner agreed to proceed to an election in any unit found appropriate.
[3] The Employer did not appear for two of the three hearing days.

should not be found ineligible as temporary employees; and (4) employees who work at both of the Employer's jobsites should be included in the same unit.

To provide a context for my discussion, I will first present an overview of the Employer's operations. Next, I will present in detail the facts and rationale for my findings that the Employer is in commerce and the Petitioner is a labor organization. Thereafter, I will address the issues of whether the Employer's employees are ineligible as temporary and whether a multisite unit is appropriate.

I. OVERVIEW OF OPERATIONS

The Employer has been in business since 2001 and is owned and operated by sole proprietor Mary Louise Cannon, who resides in Philadelphia. Mary Cannon's husband, Marcus Cannon, also plays a major role in operating the business. The Employer does not have an office or other facility but operates out of the Cannons' residence. The Employer also uses a post office box to receive correspondence.

The Employer is currently performing work pursuant to two contracts. One contract is with the Second Macedonia Baptist Church in Philadelphia (herein called the Baptist Church), for which the Employer has performed work for several years. The Employer provides janitorial services for the Baptist Church including cleaning bathrooms, vacuuming carpets, and removing trash. The Employer currently employs one employee, Bentley Woods, at this location.

The Employer's other contract is with 2700 N Broad Street LLC (herein N Broad LLC), a subsidiary of Boscarole Operating, LLC of Brooklyn, New York. The Employer secured this contract in January 2004, pursuant to which it is cleaning a vacant commercial property located at 2700 North Broad Street in Philadelphia (herein the 2700 Project), which had previously been a men's clothing manufacturing facility. The facility consists of a 10-story building with a basement and an upper room below the roof. Another company had recently performed interior demolition work on this property.

Since the 2700 Project began in January 2004, the Employer has employed about 25 employees there. At any given time, between three and 14 employees have worked on this project at a time. Currently, there are three employees, Stanley Radford, Uyuahanna Hafezee, and Eric Sanders. Marcus Cannon, who has another full-time job, helps with cleaning and manages the 2700 Project for the Employer.[4]

The work performed by the Employer on the 2700 Project consists primarily of removing the debris and loose fixtures left behind by the contractors that had performed the interior demolition work. Items regularly removed by the Employer have included cinder block,

[4] A former employee, Darnell Colbourne, testified that Mary's brother "Stanley" is a supervisor on the 2700 Project. The record does not indicate whether "Stanley" is Stanley Radford or someone else. No party has taken the position that Stanley Radford is a supervisor within the meaning of the Act or should be excluded as the close relative of the Employer's owner.

ductwork, loose pipes, hanging window frames, suit racks, and general debris. Removed items are dropped down an open elevator shaft, where they are segregated into metal and non-metal materials. The employees then load non-metal items into containers called "yarders," which are in turn loaded onto trucks for removal. Metal items are loaded onto tractor-trailers and hauled to scrap dealers. The Employer's employees commonly use various types of saws, propane torches, and drills, among other tools. The tools are owned by the Employer.

II. JURISDICTION

A. Facts

In 2003, the Employer's only customers were two Philadelphia churches, the Baptist Church and St. John's Ministry. The Employer received revenues of $20,700 from the Baptist Church and $1000 from St. John's Ministry.[5] Thus far in 2004, the Employer has grossed $10,500 for its work for the Baptist Church.

The contract for the 2700 Project by its terms called for the Employer to be paid a total of $52,000 and to complete the work by April 30, 2004. The Employer was later granted an extension to finish the project. The contract provides for payment of $3,727 as each floor is cleaned, and at the contract's outset, the Employer was paid a deposit of $5000, plus $6000 for Workers' Compensation insurance. As work progressed, the Employer assumed additional tasks, and actual payments have approximated $6000 per floor. In addition to general cleaning work, the Employer performed and was paid for: painting a handrail ($9000); repairing scaffolding ($2000); employing a subcontractor to repair plumbing ($40,000); and employing a subcontractor to repair roofing ($20,000). In total, as of June 23, 2004, N Broad LLC had paid the Employer $98,545 for services rendered.

The 2700 Project has also generated other revenue for the Employer. The Employer sold scrap metal removed from the 2700 Project to Morris Iron and Steel Company (Morris) for about $8543 and to Allegheny Iron & Metal Co., Inc. (Allegheny) for $31,646. Both Morris and Allegheny are based in Philadelphia. The Employer also earned revenue for services rendered to Carr and Associates of New Jersey (Carr), which had a contract with N Broad LLC to replace windows in the property. Carr paid the Employer $5275 in April and May to remove broken glass left on floors.

Marcus Cannon testified that total expenses on the 2700 Project at the time of the hearing were approximately $125,000. Total payroll for the project has been about $60,000. The Employer has incurred other expenses pursuant to contracts with vendors for hauling the trash that the Employer removes. To haul non-metal items, the Employer has contracted with Advance Disposal Solutions, Inc., (Advance), which is based in Philadelphia, and with Waste Management, Inc., a major national corporation with several facilities in Pennsylvania.[6] To

[5] In 2002, the Employer grossed $24,698 from cleaning churches and incurred expenses of $12,294, including $8,524 in payroll.

[6] The record does not reflect the total expenses paid to the trash haulers or the number of yarders rented. The Employer paid Advance $800 and Waste Management $660 per yarder.

transport scrap metal to dealers, the Employer contracts with Hines Trucking, a company based in Cinnaminson, New Jersey, and the Employer has paid Hines about $18,000. The Employer has also paid Bah Welding approximately $3000 and Kevin Plumbing $26,000.

In addition to its contract with the Employer, N Broad LLC has ongoing contracts with two companies based in New York, Finest Windows and Clark & Williams, to perform work at the 2700 Project. To date, 2700 N Broad LLC has paid $334,500 to Finest Windows, and more than $250,000 to Clark & Williams.

At the hearing, the parties stipulated that N Broad LLC is in commerce.

B. Analysis

The Board will assert jurisdiction over any entity that has an annual revenue outflow or inflow, direct or indirect, across state lines of at least $50,000. *Siemons Mailing Service*, 122 NLRB 81 (1959). Indirect outflow refers to sales of goods or services within the state to users meeting any standard except solely an indirect inflow or outflow standard. Direct and indirect outflow may be combined to assert jurisdiction. *Siemons Mailing Services*, supra at 85.

As the record shows that N Broad LLC purchased services in excess of $50,000 from two New York companies, N Broad LLC meets the Board's direct inflow test. Moreover, the parties stipulated that the Board has jurisdiction over N Broad LLC. Consequently, as the Employer has provided services in excess of $50,000 to N Broad LLC, the Employer meets the indirect outflow standard for the assertion of jurisdiction, and I find that the Employer is in commerce.

III. EMPLOYEE ELIGIBILITY AND UNIT ISSUES

A. Facts

The three employees on the 2700 Project have worked steadily since March for about seven hours per day and five days per week. They are paid bi-weekly and earn between $8 and $12 per hour. Stanley Radford had previously worked at the Baptist Church, but the other two employees had not previously worked for the Employer.

According to Mary Cannon, at the time of the hearing two floors remained to be cleaned, which equates to about two months more of work on the Project. The Employer has not notified the employees of a definite end date to the 2700 Project, nor has the Employer notified the employees that their employment will end at any particular time. When asked what she planned to do with the three employees at the conclusion of the 2700 Project, Cannon answered, “Well, the first thing I'm going to try to do is see if I can find them a space at the church. That would be the first thing to try and keep them if I can, to keep them working at the church.”

The Employer also uses two other individuals to perform work on the 2700 Project. The first names of these individuals are Mark and Vond; the record does not indicate their last names. The Employer refers to Mark and Vond as independent contractors, but no party as taken a

position as to their status.[7] Mark and Vond work under the name "Lehigh Construction," but there is no contract between the Employer and Lehigh Construction. They focus on cleaning glass off floors, although they have also performed some tasks. For example, Marcus Cannon testified that he sometimes asks them to perform work such as dumping trash. They have been paid about $6000 in cash and have been given tax form 1099. Mark has employed and paid as many as four other individuals to help with glass removal, but none are currently employed on this Project. Mark and Vond use the Employer's tools but set their own schedules.

At the Baptist Church, employee Bentley Woods works 26 hours per week -- seven hours on Mondays, Wednesdays, and Fridays, and five hours on Saturdays. Mary and Marcus Cannon also clean the Baptist Church. In the past, other employees worked for the Employer alongside Woods.

B. Analysis

The Eligibility of the 2700 Project Employees

Temporary employees who are employed on the eligibility date, and whose tenure of employment remains uncertain, are eligible to vote. The Board has stated that the critical inquiry is whether the employee's tenure of employment remains uncertain. If so, the employee is eligible to vote." *Marian Medical Center*, 339 NLRB No. 23 (2003); *New World Communications of Kansas City*, 328 NLRB 3 (1999), enfd. 232 F.2d 943 (8th Cir. 2000). The "date certain" test does not necessarily require that the employee's tenure is certain to expire on an exact calendar date; it is only necessary that the prospect of termination is sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired. *MJM Studios of New York, Inc.*, 336 NLRB 1255, 1256 (2001); *St. Thomas-St. John Cable TV*, 309 NLRB 712, 713 (1992), citing *Pen-Mar Packaging Corp.*, 261 NLRB 874 (1982). When termination dates are not immutable, and the employer considers the purported temporary employee for a permanent position, there is no "date certain" for termination. *New World Communications of Kansas City*, supra. Employees originally hired as temporary employees who are retained beyond the original term of their employment, and subsequently employed for an indefinite period, are included in the unit. *MJM Studios of New York*, supra; *Orchard Industries*, 118 NLRB 798, 799 (1957).

The Employer contends that the employees working at the 2700 Project are ineligible as temporary employees because the 2700 Project is nearing an end. However, although Mary Cannon estimated that it would only take about two more months to complete, the Project has previously been extended, and the Employer has not notified the employees that it would be completed at any particular time. Moreover, the Employer has not notified the employees that their employment will terminate at the end of the 2700 Project; to the contrary, owner Mary Cannon testified that she hopes to transfer employees from the 2700 Project to the Baptist Church. Thus, the employees do not have a finite date for the end of their employment, and I therefore find that they are not ineligible as temporary employees. *New World Communications of Kansas City*, supra. Cf. *St. Thomas-St. John Cable TV*, supra.

[7] Mary Cannon testified that Vond is Mark's employee, not the Employer's employee.

The Appropriateness of a Multisite Unit

The Board's procedure for determining an appropriate unit under Section 9(b) is first to examine the petitioned-for unit. If that unit is appropriate, then the inquiry ends. *Overnite Transportation Co.*, 322 NLRB 723, 723-724 (1996); *Dezcon, Inc.*, 295 NLRB 109, 111 (1989). In determining whether a petitioned-for multisite unit is appropriate, the Board considers: bargaining history; functional integration of operations; the similarity of skills, duties, and working conditions of employees; central control of labor relations and supervision; and interchange, and/or transfers of employees among the sites. *Fish Plant Services*, 311 NLRB 1294, 1297 (1993); *Oklahoma Installation Co.*, 305 NLRB 812 (1991).

In these circumstances, Woods, who works at the Baptist Church, is appropriately included in the unit with the employees at the 2700 Project.[8] The employees at both sites perform similar work, janitorial and cleanup tasks, under the control and direction of Mary and Marcus Cannon. Furthermore, one of the three employees, Stanley Radford, had been transferred to the 2700 Project from the Baptist Church, and Mary Cannon testified that she would attempt to place all of the employees remaining at the 2700 Project to work at the Baptist Church. Additionally, the Employer has historically employed other employees alongside Woods in providing services to the Baptist Church, and the Employer has had other work in the past. Thus, it is not unlikely the remaining employees at the 2700 Project will work with Woods in the future. Accordingly, I find that there is a sufficient community of interest between the employees at both sites and they constitute an appropriate unit. *Fish Plant Services*, supra; *Oklahoma Installation Co.*, supra.[9]

IV. LABOR ORGANIZATION STATUS

The Petitioner is a state-certified labor organization with approximately 4000 members. It is governed by a constitution and local bylaws and employs a Business Manager, Assistant Business Manager, Secretary/Treasurer, Recording Secretary, Organizers, and other officers and employees. The Petitioner holds regular monthly meetings for its members, has negotiated collective-bargaining agreements with various employers, and processes grievances on behalf of employees it represents.

Based on the above, I find that employees participate in the Petitioner's affairs and that the Petitioner exists for the purpose of dealing with employers concerning employees' terms and conditions of employment. Moreover, the Board has previously found the Petitioner to be a

[8] The Employer has not contended that Woods is a temporary employee.

[9] As noted above, although the Employer refers to Mark and Vond as "independent contractors," no party has taken a position as to their eligibility, and the record does not provide a detailed account of their job duties and terms and conditions of employment. The record does show that Mark and Vond generally perform some of the same tasks as other employees, using the Employer's tools, although they tend to clean up glass more than other items. The party asserting that an individual is an independent contractor has the burden of establishing that status. *BKN, Inc.*, 333 NLRB 143, 144 (2001). In these circumstances, no party has met that burden, and I shall therefore include these individuals in the unit.

labor organization within the meaning of the Act. *Laborers Local 332 (D'Angelo Brothers, Inc.)*, 295 NLRB 1036 (1989), enfd. 919 F.2d 732 (3rd Cir. 1990). Accordingly, I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act. *Alto Plastics Manufacturing*, 136 NLRB 850 (1962).

V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner is a labor organization that claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time laborers employed by the Employer, excluding all other employees, guards and supervisors as defined in the Act.

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for the purposes of collective bargaining by **Laborers' International Union of North America, AFL-CIO, Local 332**. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Eligible Voters

The eligible voters shall be unit employees employed during the designated payroll period for eligibility, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike which commenced less

than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are: 1) employees who have quit or been discharged for cause after the designated payroll period for eligibility; 2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and 3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman–Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven **(7)** days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the ***full*** names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106 on or before **August 19, 2004**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (215) 597–7658, or by E-mail to Region4@NLRB.gov.[10] Since the list will be made available to all parties to the election, please furnish a total of two **(2)** copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

[10] See OM 04-43, dated March 30, 2004, for a detailed explanation of requirements that must be met when submitting documents to a Region's electronic mailbox. OM 04-43 is available on the Agency's website at www.nlrb.gov.

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of three **(3)** working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five **(5)** working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. A request for review may also be submitted by E-mail. For details on how to file a request for review by E-mail, see http://gpea.NLRB.gov/. This request must be received by the Board in Washington by 5:00 p.m., EDT on **August 26, 2004.**

Signed: August 12, 2004

at Philadelphia, PA

/s/ [Dorothy L. Moore-Duncan]
DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four